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No. 07-1410

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *United States v. Navajo Nation*, 537 U.S. 488 (2003).

2. Whether the Court of Appeals properly held that the United States is liable to the Navajo Nation for indisputable breaches of trust arising under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development.

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INTEREST OF AMICI CURIAE

We are scholars and teachers of American Indian law at five universities. The trust relationship between the United States and American Indian nations is at the core of our work. The basic question in this case involves an essential aspect of that relationship: the obligations of the United States as trustee. We therefore offer this brief to connect the case to the history and practices of the trust relationship.[1]

SUMMARY OF ARGUMENT

Trust law arose in medieval England when landowners made conveyances to grantees to the use (benefit) of themselves, the Church, legatees, and others. The law courts refused to recognize use agreements and gave plenary power over the property to feoffees to uses (grantees for the benefit of others). This power was perceived as unfair, and the Court of Chancery undertook to enforce uses, which evolved into modern trusts. Chancery also enforced rights of wards against faithless guardians. The essential principle behind development of the trust was the

[1] No part of this brief was authored by counsel for any party. No party made a monetary contribution to fund preparation or submission of this brief. The University of Colorado paid for printing and service of this brief. No other person made any monetary contribution to the brief.

unfairness of the law courts' according plenary power to faithless feoffees to uses.

American lawyers recognized the analogy to trust law of the relationship between the United States and American Indian nations. The Nonintercourse Act of 1790, still in force as amended, gave the federal government absolute control over conveyances of tribal land. This Court determined that the United States holds fee title to tribal land. In time, the Court held that Congress has "plenary control" over tribes and their property.

The power of the United States over tribes and their property is unique and extraordinary in a democracy, tempered by no political control. When members of Congress vote to impose rules on Indian nations or individuals, they fear no retribution at the ballot box. This power moved Chief Justice Marshall to write that Indian nations' "relationship to the United States resembles that of a ward to his guardian."

Treaties with tribes followed by numerous federal statutes adopted the trust concept as positive law. It is beyond question that most tribal land, including the Navajo Reservation, is held in trust. This Court has applied the trust concept to protect tribes' beneficial ownership. While recognizing Congress's great power to control Indian property, the Court has insisted that legislative intent to act against tribes be clearly expressed.

Decisions in claims cases prior to passage of the Indian Tucker Act relied on trust principles. Under

the Act, this Court's decisions support liability here. The *Mitchell* cases correctly framed the question of liability in terms of federal control, reflecting the historical origins of trust law. In *Mitchell I*, the Court held that the only trust duty imposed on the Government was to protect the Indians' ownership from loss by voluntary or involuntary conveyance. *Mitchell* did not involve faithless acts of conveyance, but the instant case does. The nation's highest official exercising control over tribal land breached trust duties in his exercise of unfettered power over conveyance of Navajo coal. He abused his absolute discretionary power to help out a friend who represented the interest directly opposed to the tribal trust beneficiary. Losses from fraudulent acts that abuse total control over tribal conveyances should be compensable.

The Navajo-Hopi Rehabilitation Act, which authorized the basic lease at issue in this case, is based on the reasoning set out above. The act implies that the Government is liable for faithless acts not expressly shielded, and it requires the Government to keep Indian beneficiaries informed. The Indian Mineral Development Act, which governed at least part of the transactions at issue, is also based on trust concepts. IMDA expressly absolves particular kinds of conveyances, reflecting Congress's understanding that the U.S. would otherwise be liable. The Government's claim of tribal self-determination is false when it maintains absolute control, which

should be measured by fiduciary standards that are vindicated by meaningful remedies.

ARGUMENT

I. TRUST AND GUARDIANSHIP LAW IN INDIAN AFFAIRS

A. English Origins of Trust Law.

As every American law student learns in the first year of study, trust law arose in medieval England in reaction to rigidities of English land law. Owners who left for the Crusades conveyed to trusted caretakers. The law forbade conveyances of land to the Church or by will, so owners made conveyances for the use of friars or legatees. "Use" is derived from the Latin for benefit, quite apart from the ordinary English word.[2] When feoffees to uses (grantees for the benefit of others) fraudulently cheated beneficiaries, the law courts gave no redress. They enforced all rights of ownership in legal title holders. The Court of Chancery arose to address the perceived unfairness of the law courts' refusal.

The essential principle behind development of the trust was the unfairness of the law courts' according

[2] *See* 4 W. S. Holdsworth, A History of English Law 417-20 (1924); Theodore F. T. Plucknett, A Concise History of the Common Law 576-77 (5th ed. 1956); J. H. Baker, An Introduction to English Legal History 248-50 (4th ed. 2002).

plenary power to faithless feofees to uses. Similar principles were enforced in chancery against another abuse of legal power: guardians who helped themselves to their wards' property.

B. Applying Trust Concepts to the Federal-Tribal Relationship.

English trust law was of course familiar to Americans, and its analogy to the relationship between the United States and American Indian nations was soon recognized. Before the Revolution, Indian affairs were a source of tension between the Crown and American settlers. Crown consent to land acquisitions was the formal rule, which settlers sought to circumvent. The well-known Royal Proclamation of 1763 reserved all land west of the Appalachians "for the use" of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection."[3]

After independence, Congress passed the Nonintercourse Act of 1790, forbidding conveyances of Indian land without the federal government's consent.[4] In 1823, in *Johnson v. M'Intosh*, this Court

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[3] *Quoted in* 3 The American Indian and the United States 2135-39 (Wilcomb E. Washburn, ed. 1973). This in turn was twisted into one of the grievances against the Crown recited in the Declaration of Independence. *See* Robert J. Miller, Native America, Discovered and Conquered 62 (2006).

[4] Act of July 22, 1790, § 4, 1 Stat. 138.

ruled consistently with the statute and stated that the United States held fee title to tribal land subject to the Indian "right of occupancy."[5] In other words, the United States had absolute control over conveyances of tribal land. The statute of 1790 as amended remains federal law today.[6] Claimed federal control reached its zenith in the notorious case of *Lone Wolf v. Hitchcock*. The Court held that Congress had "plenary control" over tribes and their property, immune from judicial review.[7] To this day, the Court continues to reiterate the doctrine of plenary power.[8]

The power of the United States over tribes and their property is unique and extraordinary in a democracy. It was tempered by no political control; Indians lacked the right to vote until their relative numbers were too small to exercise any restraint.[9] When members of Congress vote to impose rules on Indian nations or individuals, they fear no retribution at the ballot box.

The resemblance of tribes to trust beneficiaries was noted by many, including members of this Court. Famously, Chief Justice Marshall was moved to write

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[5] 21 U.S. 543, 587 (1823).

[6] 25 U.S.C. § 177.

[7] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[8] *E.g.*, United States v. Lara, 541 U.S. 193, 200 (2004).

[9] *See* Cohen's Handbook of Federal Indian Law § 14.01 (2005 ed.). Of course the English landowners who sought aid from the Court of Chancery *had* political power.

that Indian nations' "relationship to the United States resembles that of a ward to his guardian."[10] The following year, the Court stated that under the Cherokee treaties, the United States had assumed "the duty of protection" over the Cherokees and "of course pledging the faith of the United States for that protection."[11] In 1885, Congress asserted control over all Indian felonies by passing the Major Crimes Act.[12] Its validity was attacked in this Court for lack of an enumerated power to enact it. The Government argued that the Commerce Clause conferred the necessary power, but the Court disagreed.[13] Nevertheless it sustained the statute, concluding: "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power."[14] In other words, federal "plenary power" is not restricted to commercial subjects.

Of course, judicial *dicta* expressing the opinion that the federal government's unchecked power ought to give rise to reciprocal obligations akin to those of a trustee or guardian could not create legal duties without recognition in positive law. But treaties with

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[10] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[11] Worcester v. Georgia, 31 U.S. 515, 556 (1832).

[12] Act of Mar. 3, 1885, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153).

[13] United States v. Kagama, 118 U.S. 375, 378-79 (1886).

[14] *Id*. at 383-84.

tribes followed by numerous federal statutes have adopted the trust concept. This first occurred in treaty language. Many treaties between the United States and American Indian nations expressly place the tribal party under the "protection" of the United States.[15] While exercising its enormous power to pass the General Allotment Act of 1887 over determined Indian opposition, Congress formally provided that allotments would be held in trust by the United States.[16] Numerous statutes since have used language of trust to define the federal-tribal relationship. It is beyond question that most tribal land, including the Navajo Reservation, is held in trust.[17]

This Court has applied the trust concept to protect tribes' beneficial ownership. In *Lane v. Pueblo of Santa Rosa*, the Court sustained an injunction barring the Secretary of the Interior from disposing of tribal land without legal authority.[18] No specific law forbade the Secretary's action; it was simply a classic breach of trust, "not an exercise of guardianship, but an act of confiscation."[19] While recognizing Congress's great power to control Indian property, the Court has

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[15] *See* Cohen's Handbook of Federal Indian Law 28 (2005 ed.).

[16] Act of Feb. 8, 1887, §§ 1-3, 24 Stat. 388 (formerly codified at 25 U.S.C. §§ 331-333).

[17] *See* United States v. Navajo Nation, 537 U.S. 488, 495 (2003).

[18] Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919).

[19] *Id*. at 113.

insisted that legislative intent to act against tribes be clearly expressed. It adopted "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[20]

For the last 75 years, federal policy has receded from claims of absolute control over Indian property. The coercive allotment policy has been repealed. Positive law now accords Indian nations much greater authority over their own land. Nevertheless, that land is still held in federal trust, and its conveyance continues to require consent of officers of the United States in their sole discretion.

II. APPLICATION OF TRUST CONCEPTS SUPPORTS LIABILITY IN THIS CASE

A. Decisions Prior to Passage of the Indian Tucker Act Relied on Trust Principles.

When should courts find a cause of action for damages against the United States in its management of tribal property? Prior to passage of the Indian Tucker Act in 1946, Congress addressed this question by enactment of consents to sue the United States case-by-case for each tribe.[21] In review of

[20] Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1919).

[21] *See generally* Richard B. Collins & Karla D. Miller, A People Without Law, 5 Indigenous L. J. 83, 112-15 (2006).

adjudications under these statutes, this Court generously applied trust law principles to adjudge actions of federal officials. In *United States v. Creek Nation*, the Court affirmed an award of money damages for lands that had been excluded from Creek territory and sold to non-Indians pursuant to an incorrect federal survey.[22] The Court supported its decision by reference to trust principles:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.[23]

In *Seminole Nation v. United States*, the Court stated:

> In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct,

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[22] 295 U.S. 103 (1935).

[23] *Id*. at 109-10.

> as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[24]

In the post-1946 decision in *United States v. Mason*, the Court cited a leading treatise on the law of trusts for standards governing the United States as trustee of Indian land.[25]

B. Decisions Applying the Indian Tucker Act Support Liability in This Case.

The Court's decisions in the *Mitchell* cases[26] framed the question of liability in terms of federal control, reflecting the historical origins of trust law. That litigation involved mismanagement of timber resources held in trust for individual Indians. In *Mitchell I*, the Court held that the trust title did not give the Government control of Indian trust timber or impose any timber management duties, so it could not be the basis of liability for mismanagement. But *Mitchell II* held that the timber management statutes gave the Government total control and imposed duties of prudent management, breach of which supported liability ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to

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[24] 316 U.S. 286, 297 (1942).

[25] 412 U.S. 391, 398 (1973).

[26] United States v. Mitchell, 445 U.S. 535 (1980) (*Mitchell I*); United States v. Mitchell, 463 U.S. 206 (1983) (*Mitchell II*).

Indians."[27]). Returning to *Mitchell I*, the Court held that the only trust duty imposed on the Government was to protect the Indians' ownership from loss by voluntary or involuntary conveyance.[28] In other words, it imposed on the Government the same absolute control over conveyances of individual Indian trust land, and the trust duty to protect Indian ownership, that the Nonintercourse Act imposes on tribal trust land.[29]

The *Mitchell* cases did not involve faithless acts of conveyance, but the instant case does. The Secretary of the Interior, the nation's highest official exercising federal control over tribal land, breached two duties in his exercise of unfettered power over conveyance of Navajo coal. First, the 1964 lease imposed on him the authority and clear duty to revise a royalty rate that had become "extremely low" by 1984.[30] Second, every conveyance of tribal trust property required his approval, which he had absolute discretion to withhold. Instead of carrying out these duties, he secretly decided to help out a friend who represented Peabody, the interest directly opposed to the tribal trust beneficiary. He helped that opposing interest to deceive the Navajo Nation into believing that he would not revise the royalty rate. After the Navajos gave in to Peabody's lower rate, he approved

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[27] 463 U.S. at 224.

[28] 445 U.S. at 543-44.

[29] 25 U.S.C. § 177.

[30] Resp. Br. 9-10.

the deal, fully aware that he had misled the tribe in crucial ways. These were fraudulent acts respecting the absolute control of the United States over conveyances of tribal property. Losses from direct abuse of total control over tribal conveyances should be compensable.[31]

As Respondent's brief explains in detail, the Navajo-Hopi Rehabilitation Act, which authorized the basic lease at issue in this case, is based on the reasoning set out above.[32] The act absolves the Government of liability for specific kinds of conveyances, clearly implying its liability for other faithless acts. It expressly requires the Government to keep Indian beneficiaries informed. This provision is a move toward tribal self-determination, which, the Government argues, excuses the Secretary. But the only reasonable reading of the provision is that a tribe given honest information can make its own decision, for which the Government cannot be liable. It does not and cannot excuse deception.

The structure of the Indian Mineral Development Act, which governed at least part of the transactions at issue, is also based on trust concepts.[33] Like the Rehabilitation Act, IMDA expressly absolves the

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[31] Respondent's brief details the many regulations and collateral statutes that gave the Secretary smothering control over coal leasing in particular.

[32] Resp. Br. 33-40.

[33] 25 U.S.C. §§ 2301-2308. On the Act's application to this case, see Resp. Br. 46 n. 14.

Government from liability for particular kinds of conveyances, reflecting Congress's understanding that it would otherwise be liable.[34]

The Government argues tribal self-determination. We share its solicitude for this just goal. But unfettered federal control over conveyances of tribal land is no part of self-determination. So long as the Government maintains the absolute control that it asserted in 1790, its exercise of that control should be measured by fiduciary standards that are vindicated by meaningful remedies. The history of Indian claims cases fully supports such a remedy.

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[34] 25 U.S.C. § 2303(e).

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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